No. 84-87 (2)

In the Supreme Court of the United States

OCTOBER TERM, 1984

KENNETH D. HANES, PETITIONER

v.

MARGARET M. HECKLER, SECRETARY OF HEALTH AND HUMAN SERVICES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

REX E. LEE
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

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TABLE OF AUTHORITIES

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Petitioner contends that the courts below erred in upholding the decision of the Secretary of Health and Human Services denying his application for disability insurance benefits under Sections 216(i) and 223 of the Social Security Act, 42 U.S.C. 416(i) and 423.

1. Petitioner, a former sheet metal worker, filed an application for disability insurance benefits on May 14, 1980, alleging disability, beginning in May 1979, resulting from a back injury. The application was denied at the initial determination stage and upon reconsideration. Thereafter a hearing was held before an administrative law judge (ALJ). Pet. App. 17.

In a decision dated June 5, 1981, the ALJ concluded that petitioner was not disabled (Pet. App. 17). The evidence showed that petitioner had fallen from a roof and severely injured himself in 1969, but was able to return to work until

May 1979, when he injured his back lifting a piece of steel at work (ALJ Decision 4).[1] Although the ALJ observed that petitioner did have some exertional and non-exertional impairments resulting from his back injury,[2] he found that those impairments would not prevent petitioner from performing "sedentary substantial gainful activity" that did not involve climbing, bending, stooping or operating foot controls (ALJ Decision 9). This determination was based in part on the testimony of a vocational expert, who identified specific jobs petitioner could perform, such as inspection and quality control, and estimated that there were 1000 jobs in the Chicago area that petitioner could perform even in light of limitations on his physical activities (*id.* at 7-8). Based on the objective medical evidence in the record and petitioner's appearance at the hearing, the ALJ found that petitioner's assertion that he had constant back pain so severe as to be disabling was "less than credible" (*id.* at 9). The ALJ further found that the level of work petitioner could perform was not "significantly limited" by his alleged pain and discomfort (*ibid.*). The ALJ's decision became the final decision of the Secretary when the Appeals Council approved it on August 12, 1981 (Pet. App. 17-18).

Petitioner then sought judicial review in the United States District Court for the Northern District of Illinois. In an unpublished memorandum and order, the district court held that the Secretary's findings were supported by substantial evidence and granted the Secretary's motion for summary judgment (Pet. App. 17-23). The district court

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[1]We have lodged a copy of the ALJ's decision with the Clerk of the Court.

[2]The ALJ found that petitioner's physical impairments included "post healed compression fracture of L2 [lumbosacral spine], moderate to severe lumbosacral sprain, osteoarthritis, radiculitis on the right side, and accompanying discomfort" (ALJ Decision 9).

rejected petitioner's contention that the ALJ had failed to consider his subjective assertions of pain. The court agreed with petitioner that pain may serve as a basis for establishing disability even if unaccompanied by positive clinical findings or other objective medical evidence (Pet. App. 21, citing *Marcus* v. *Califano*, 615 F.2d 23 (2d Cir. 1979), and *Stark* v. *Weinberger*, 497 F.2d 1092 (7th Cir. 1974)), but it noted that petitioner's testimony regarding the pain he experienced in fact had been fully developed at the hearing (Pet. App. 21). The court found no reason to disturb the ALJ's assessment of that evidence and his resulting conclusion that petitioner's pain was not disabling. The court explained that credibility decisions are "properly made by the ALJ who had the opportunity to observe and question the witness, and not by a reviewing court faced with a bare written record" (*id.* at 21-22).

The court of appeals affirmed on the basis of the district court's opinion (Pet. App. 25).

2. The decision of the district court, adopted by the court of appeals, is clearly correct and does not conflict with any decision of this Court or any other court of appeals. Further review of petitioner's fact-bound submission is not warranted.

a. Petitioner contends (Pet. 7-8) that the district court erred in evaluating his subjective complaints of pain. However, the district court actually applied a legal standard that is quite favorable to the claimant, stating that "[s]ubjective pain may serve as the basis for establishing disability, even if unaccompanied by positive clinical findings or other objective evidence" (Pet. App. 21, citing *Marcus* v. *Califano*, 615 F.2d at 27). Petitioner cites no case establishing a standard that is more favorable to disability claimants (compare, *e.g.*, *Polaski* v. *Heckler*, 739 F.2d 1320 (8th Cir. 1984)), and indeed petitioner does not even challenge the standard applied by the courts below (see Pet. 8).

That legal issue is of no continuing importance in any event, because Congress recently prescribed statutory standards for evaluating pain in disability cases when it enacted the Social Security Disability Benefits Reform Act of 1984, Pub. L. No. 98-460, 98 Stat. 1794 *et seq.* Those standards, set forth in Section 3(a)(1) of the 1984 Act, are more stringent than the standard applied in this case. Section 3(a)(1) provides that an individual's statement of pain is not alone conclusive evidence of disability; that "[o]bjective medical evidence" of pain must be considered; and that there must be medical findings based on acceptable diagnostic techniques that show the existence of an impairment that could reasonably be expected to produce the pain and that, when considered with all evidence in the record, would lead to a conclusion that the individual is disabled.[3] Petitioner's case, which arose under prior law, therefore does not present a legal issue that warrants review by this Court.[4]

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[3]Section 3(a)(1) of the 1984 Act adds the following text to Section 223(d)(5) of the Social Security Act, 42 U.S.C. 423(d)(5):

> An individual's statement as to pain or other symptoms shall not alone be conclusive evidence of disability as defined in this section; there must be medical signs and findings, established by medically acceptable clinical or laboratory diagnostic techniques, which show the existence of a medical impairment that results from anatomical, physiological, or psychological abnormalities which could reasonably be expected to produce the pain or other symptoms alleged and which, when considered with all evidence required to be furnished under this paragraph (including statements of the individual or his physician as to the intensity and persistence of such pain or other symptoms which may reasonably be accepted as consistent with the medical signs and findings), would lead to a conclusion that the individual is under a disability. Objective medical evidence of pain or other symptoms established by medically acceptable clinical or laboratory techniques (for example, deteriorating nerve or muscle tissue) must be considered in reaching a conclusion as to whether the individual is under a disability.

[4]The special statutory remand provisions in Section 2(d) of the 1984 Act, which were at issue in *Heckler* v. *Kuehner*, No. 83-1593 (Nov. 5, 1984), apply only to cases relating to the "medical improvement" issue,

b. Petitioner next contends (Pet. 8-12) that the ALJ erred in his assessment of the evidence. Specifically, petitioner maintains (Pet. 9-12) that his testimony regarding pain was discredited by the ALJ solely on the basis of petitioner's appearance at the hearing, rather than on the basis of all the evidence in the record, and that the ALJ disregarded objective medical evidence. This assertion is incorrect. The ALJ explicitly stated that his finding that petitioner's allegation of severe and constant pain was "less than credible" was "[b]ased on the hearing appearance *and the objective medical evidence of record*" (ALJ Decision 9 (emphasis added); Pet. App. 20), not on petitioner's appearance at the hearing alone.[5] Furthermore, the ALJ specifically noted that several medical reports indicated that the compression fracture of petitioner's lumbosacral spine ten years earlier was well healed (ALJ Decision 7).

c. Finally, petitioner contends (Pet. 13-14) that the Secretary did not attach appropriate weight to the opinions of his treating physicians. Quoting the Second Circuit's decision in *Rivera* v. *Schweiker*, 717 F.2d 719, 723 (1983), petitioner argues (Pet. 14) that the treating physician's conclusion is "binding" absent substantial evidence to the contrary. Even assuming that petitioner were correct about the binding effect of a treating physician's testimony, such a

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which arises only in connection with the review of the disability of persons who previously had been found to be disabled. Those provisions have no application here, because petitioner is a new applicant for disability benefits, not a recipient of benefits whose continuing eligibility was reviewed by the Secretary. There accordingly is no basis for a remand in light of the new Act.

[5]The decision in this case therefore is fully consistent with the Second Circuit's holding in *Rivera* v. *Schweiker*, 717 F.2d 719 (1983), relied upon by petitioner (Pet. 11-12), that the ALJ's credibility determination "should be arrived at in light of *all* the evidence regarding the extent of pain" (717 F.2d at 724).

rule would not aid him here. The ALJ explained that two of the four medical reports in the record, including one from a treating physician (Dr. Farah), concluded that petitioner was capable of performing sedentary work (ALJ Decision 5-7, 8). Moreover, the other treating physician, Dr. Groves, also had initially concluded that petitioner was capable of performing medium substantial gainful activity, although he concluded in a subsequent report that petitioner was unable to work (*id.* at 6, 8). The ALJ explained that he was discounting the latter report because there was no new evidence to support the physician's changed view (*id.* at 8).

In any event, Section 9(b)(1) of the Social Security Disability Benefits Reform Act of 1984 now specifically addresses the question of the treating physician's opinion. The new provision clearly does not require the Secretary to give controlling weight to the treating physician's opinion.[6] Petitioner's assertion regarding the impact of such evidence under prior law therefore is inconsistent with Congress's judgment and raises no issue of continuing importance warranting this Court's consideration.

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[6]Section 9(b)(1) adds a new paragraph (B) to Section 223(d)(5) of the Social Security Act, 42 U.S.C. 423(d)(5). The new paragraph (B) provides that the Secretary shall consider all evidence available in the individual's case record and "shall make every reasonable effort" to obtain "all medical evidence" from the treating physician "prior to evaluating medical evidence obtained from any other source on a consultative basis." Although the new Act therefore requires the Secretary to make efforts to procure evidence from the treating physician, it does not require that such evidence be given a presumptively binding effect. To the contrary, the new provision for procuring such evidence was drawn from the Senate bill (130 Cong. Rec. H9830 (daily ed. Sept. 19, 1984)), and the Senate Report states that, by adding this requirement, "[t]he Committee does not intend to alter in any way the relative weight which the Secretary places on reports received from treating physicians and from consultative examinations." S. Rep. 98-466, 98th Cong., 2d Sess. 26 (1984).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

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